Supreme Court, U.S.
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No. 95-1467

In The

Supreme Court of the United States

October Term, 1995

THE PILLSBURY COMPANY, INC.,

Petitioner,

v.

THE PORT OF CORPUS CHRISTI AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Much of the material in the Port's Brief in Opposition ("Opp. Br.") and the supporting "Brief Amicus Curiae in Opposition to Petition" is simply not relevant. Pillsbury fully recognizes the importance and purpose of the Eleventh Amendment, and agrees that a State may claim its protection. However, the Port is *not* a State and is not entitled to the protection of the Eleventh Amendment under this Court's precedents. Therefore, arguments about "state dignity," for example, which in any event are not mentioned in the decision below and were not made below, have no bearing here.

Pillsbury nevertheless agrees with the Port and its supporting amicus on several key points. As the Port notes, there is a persistent and well-established line of Fifth Circuit authority affording Eleventh Amendment immunity from suit in federal court to port authorities in Texas. Opp. Br. at 2. The Texas Supreme Court has also recognized this line of jurisprudence (without the benefit of any independent analysis). *See Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 815 (Tex. 1993) (following *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983), and *McDonald v. Bd. of Miss. Levee Comm'rs*, 832 F.2d 901, 908 (5th Cir. 1987)). Despite its age and resistence, this line of authority is not consistent with this Court's jurisprudence and the jurisprudence of the other circuit courts.

Pillsbury also agrees with the Port's supporting amicus that "this case involves a constitutional issue of obvious significance" and that it "broadly affects the public interest." Motion of Port of Houston Authority for

Leave to File Brief Amicus Curiae at 2; *see also id.* at 3 (noting "the importance of the issues presented"). The Port of Houston, as one of the largest ports in the world, "plays a pivotal role" not only "in the Texas economy," *id.* at 1, but also in the entire nation's economy. The Port of Corpus Christi is another of the largest ports in the country. Whether these two ports and other port authorities in Texas (*see* Petition at 17 n.3), which play such a major role in the nation's commercial life, will be legally responsible for their commercial actions, is thus an issue worthy of this Court's attention.

The parties also agree on the key facts of the case. The Port concedes that judgments against it are not paid from the state treasury and that the only "control" the State of Texas exercises over port authorities in Texas is through amending their operating statutes (Opp. Br. at 4), which is the same "control" the State exercises over other political subdivisions such as cities and counties. Accordingly, Pillsbury need not and does not rely on a narrow reading of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. ___, 115 S. Ct. 394 (1994), as under either the Court's or the dissent's analysis in *Hess*, the Port is not entitled to Eleventh Amendment immunity. In fact, the application of *any* of the last 25 years of this Court's Eleventh Amendment jurisprudence to the admitted facts of this case demonstrates that the Port is not entitled to Eleventh Amendment immunity.

The Fifth Circuit's persistent and well-established line of authority has resisted this Court's decisions concerning Eleventh Amendment immunity and, as the opinion below demonstrates, the Fifth Circuit continues to resist this jurisprudence. Far from implicitly applying

Hess, the court below dismissed *Hess* as "a limited holding" that did not apply in this context. *See* Petition, App. A at A3-A4, 66 F.3d at 104. Indeed, the Fifth Circuit's conclusion in this entire line of cases is so contrary to this Court's Eleventh Amendment decisions that there is no way the Fifth Circuit could have been "implicitly" applying that jurisprudence. This Court should bring the Fifth Circuit in line with the rest of the country, so that the criteria for Eleventh Amendment immunity are uniform throughout the United States.

CONCLUSION

The petition for writ of certiorari should be granted. In addition, this Court should consider summarily reversing the decision below.

Respectfully submitted,

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